Hammary Manufacturing Corporation, a Division of U.S. Industries, Inc. *and* Upholsterers' International Union of North America, AFL-CIO. Case 11-CA-8232

October 8, 1982

ORDER GRANTING MOTION AND AMENDING DECISION AND ORDER

On September 30, 1981, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which it affirmed the rulings, findings, and conclusions of the Administrative Law Judge and adopted his recommended Order with certain modifications. The Board found, *inter alia*, that Respondent had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by disparately maintaining and enforcing a no-solicitation rule which prohibits union solicitation, but permits nonunion solicitation. The Board ordered that it cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices.

On December 18, 1981,[2] Respondent filed a motion for reconsideration contending that the Board should reconsider its conclusion that a no-solicitation rule is invalid on its face because it makes an exception for the United Way campaign. Thereafter, the General Counsel filed an opposition[3] and supplemental motions in response; Respondent filed a supplemental motion for reconsideration; the United Way of America filed a motion to modify or to set aside the Board's Decision and Order; the National Association of Convenience Stores and the Chamber of Commerce of the United States of America each filed a brief *amicus curiae*. It is now the position of all parties to this proceeding that the Board reconsider its Decision insofar as it relates to footnote 2 concerning Respondent's exception for the United Way campaign.

Having duly considered Respondent's motion, the responses filed thereto, and the entire record in the case, the Board grants[4] Respondent's motion to the extent set forth below:

Footnote 2 is amended by striking the following language therefrom:

"Additionally, we find Respondent's no-solicitation rule invalid to the extent that it sets out the annual campaign for the United Way as 'the sole exception' to the rule's restrictions on solicitation. This exception does nothing less than sanction the rule's disparate application and therefore is unlawful."

MEMBER FANNING, concurring:

I concur. Member Jenkins in his dissent decides an issue not required by the complaint in this case, and then insists that his colleagues decide the same issue. Contrary to his assertions, it is not necessary to determine whether Respondent's no-solicitation rule, which made an exception for the United Way, is *per se* lawful or unlawful. The facial validity of the rule was not attacked by the complaint, and it is not appropriate to decide that important policy issue in the present posture of this proceeding. The evidence presented, including evidence of numerous exceptions that Respondent made to its no-solicitation policy in behalf of the United Way and other activities, establishes that Respondent has treated union activity differently from nonunion activity, and thereby has violated the Act. That is all that it is necessary to decide here. It is all the Board should decide here. It is all I do decide here.

MEMBER JENKINS, dissenting in part:

My colleagues here hold lawful Respondent's no-solicitation rule which prohibits all employee

[1] 258 NLRB 1319.

[2] Pursuant to Sec. 102.48(d) of the Board's Rules and Regulations, Series 8, as amended, the due date for receipt of motions for reconsideration filed with the Board in this proceeding was October 23, 1981. In light of the circumstances involved herein, the Board has decided to consider the Respondent's motion for reconsideration.

[3] The General Counsel has withdrawn the opposition.

[4] Our dissenting colleague's position is simply that any exception to a no-solicitation rule establishes that the employer's interest in maintaining production and discipline does not, as a matter of law, outweigh the Sec. 7 right of employees to engage in union solicitation. Certainly any exception is a factor to be considered in determining the validity of such rules. It is not, however, the only factor, and we cannot agree that the *per se* standard urged by the dissent adequately or reasonably strikes the proper balance. The Board and the courts consistently have held that an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated "beneficent acts" as narrow exceptions to a no-solicitation rule. See, e.g., *Serv-Air, Inc.* v. *N.L.R.B.*, 395 F.2d 557 (10th Cir. 1968), on remand 175 NLRB 801 (1969); *Emerson Electric Co., U.S. Electrical Motors Division*, 187 NLRB 294 (1970). Thus, rather than finding an exception for charities to be a *per se* violation of the Act, the Board has evaluated the "quantum of . . . incidents" involved to determine whether unlawful discrimination has occurred. See, e.g., *Serv-Air, Inc.*, 175 NLRB 801 (1969); *Saint Vincent's Hospital*, 265 NLRB 38 (1982).

In this case the question presented is whether Respondent treated union activity in a discriminatory manner. Our determination that it did is not based on the existence of the stated exception for United Way solicitations. But we do consider evidence concerning the level and nature of solicitations under that exception in evaluating the rule. As our original decision and the Administrative Law Judge's Decision pointed out, despite maintaining a no-solicitation rule, Respondent permitted employees during working time to sell numerous products, to conduct a raffle, and to collect for a flower fund, and itself sponsored an annual United Way campaign. Yet, Respondent prohibited employees for engaging in union activities and discharged an employee for union solicitation. These facts warrant our finding that Respondent applies its no-solicitation rule in a disparate manner. The General Counsel does not contend that the no-solicitation rule on its face was unlawful, and indeed acknowledges in his memorandum in support of Respondent's motion that an employer's tolerance of isolated beneficent solicitation does not by itself constitute sufficient evidence of disparate treatment of union solicitation. Our decision here simply represents a determination that the evidence presented establishes Respondent's disparate treatment of union activity. The dissenting opinion volunteers a broad policy conclusion not required by the facts of this case.

solicitation in its plant, including union solicitation, except that solicitation for the United Way is permitted. United Way solicitation is, of course, formal, thorough, extensive, repetitious, and protracted. Thus, in its interference with production discipline it is in every way comparable to union solicitation. Indeed, an element of employer coercion in support of the solicitation (arguably increasing the disruption of production) is often present, not often found in union campaigns. It should be made plain at the outset that we are not considering here a case of *de minimis* incursion into employee rights,[5] or a case where the solicitation is by nonemployees for purposes directly and immediately related to the work of the employer.[6] With such cases I have no disagreement. But my colleagues, in their footnote response to my argument, fail to make it clear that they are validating an employer rule permitting charitable solicitation on a scale comparable to union solicitation, and simultaneously prohibiting the union solicitation which the statute protects. This is the issue on which we part company.

The National Labor Relations Act grants employees a statutory right to engage in union solicitation at their place of work limited only by an employer's legitimate interest in maintaining productivity and plant discipline.[7] Accordingly, this Board finds presumptively lawful rules restricting union solicitation while employees are expected to be working.[8] This standard the Supreme Court has approved as "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and equally undisputed right of employers to maintain discipline in their establishment."[9] However, where such rules are enforced against union solicitation and not against other forms of solicitation, the employer's interest in production and discipline is overcome by the employees' Section 7 interest in not allowing the employer to subject their union activity to disparate standards.[10] These principles are part of the bedrock of the Act's protection of employees' freedom to engage in concerted activity and collective bargaining.

The majority asserts that to find unlawful interference here would amount to a "*per se*" rule and that a "proper balance" requires that this disparate treatment of union solicitation be permitted. However, the Act does not permit an employer to engage in "one," "some," or "a few" instances of interference, restraint, coercion, or discriminatory discharge; one is a violation, and repetition is not necessary. The balance in the inplant solicitation by employees for their own union was struck in *Republic Aviation* at the point where the employer, in the interest of production, could uniformly prohibit solicitation. At that point, the balancing is exhausted; the further intrusion by the employer which my colleagues permit creates a prohibited imbalance.[11]

Equally misplaced is my colleagues' objection that I would establish a *per se* rule, contrary to the statute. But the Act itself establishes, by its own terms, that discrimination against employees' support of a union is *per se* a violation of the statute. Permitting conduct to others while prohibiting the same conduct by union supporters is, by definition, discrimination. The Act does not permit a little bit of discrimination, here or there, now and then; it forbids all of it. In advancing the *per se* rule objection my colleagues confuse two different issues: determination of facts, such as adequate access to employees outside the plant by nonemployee organizers (in which we avoid *per se* rules) and determining issues of law, such as whether disparate treatment between union supporters and others is forbidden discrimination (in which cases we uniformly find a violation). The disparate treatment here concededly occurred, and a *per se* rule that it violates the Act is no more objectionable than a *per se* rule that a discriminatory discharge does so. In holding otherwise, my colleagues allow an employer to determine that interference with production and discipline for purposes he determines to be desirable (United Way, factory outlet tours, or raffle tickets) are tolerable for business reasons, and that union solicitation is *per se* not thus tolerable. That is, they allow the employer to establish his own *per se* rule against union support in the plant.

My colleagues have themselves, repeatedly and recently, rejected this course of action. They have found that prohibiting union solicitation for unions is unlawful if solicitation for U.S. Savings Bonds, United Way, and the Boston Pops Orchestra is permitted.[12] And they have reached the same result where union solicitation was prohibited and the worthy purposes which were allowed to solicit were the Salvation Army, Disabled Veterans, and

[5] See, e.g., *Emerson Electric Co., U.S. Electrical Motors Division*, 187 NLRB 284, fn. 2 (1970); *Serv-Air, Inc.*, 175 NLRB 801, 802, fn. 3 (1969).

[6] See, e.g., *Rochester General Hospital*, 234 NLRB 253, 259 (1978).

[7] *Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores*, 198 NLRB 281 (1972).

[8] *Peyton Packing Company, Inc.*, 49 NLRB 828, 849 (1943); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962).

[9] *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793, 797–798 (1945).

[10] *Lenox Hill Hospital*, 225 NLRB 1237, 1242 (1976); *Montgomery Ward & Co., Incorporated*, 202 NLRB 978 (1973).

[11] *Paceco, a Division of Fruehauf Corporation*, 237 NLRB 399 (1978); *Imco Container Company*, 208 NLRB 874 (1974).

[12] *Honeywell, Inc.*, 262 NLRB 1402 (1982) (Chairman Van de Water and Members Jenkins and Zimmerman).

Shriners.[13] Does United Way in this case have some special magic these other worthy purposes do not, and it itself lacked in the first case? If so, what is it?

My colleagues' new standard will require them next to consider how much and what kind of nonunion solicitation will compel the employer to allow union solicitation. For two charities? Several? Which? All? How are we to determine what is a charity? For noncharitable but public purposes? Education? Civic and community activities? And how much solicitation by the union must be permitted in "balance" to these other solicitations? Are all these issues to be left to the employer's judgment? If not, the end of this new workload for the Board is not in sight, though our lack of expertise is. And, most importantly, if the "balance" is struck in favor of one or more worthy purposes, how can my colleagues ignore the congressional declaration in the Act that collective bargaining by employees through unions is a public and national good?

That the benficiary of the solicitation here may be the exemplar, and is almost certainly the most pervasive, of worthy purposes warrants no exception for it. The only exception to the Act's requirements originally was "hospitals"; from this, the Board analogized to establish other worthy purpose exemptions in a rather checkered and inconsistent fashion, an approach which appears to me to have been wholly unwarranted. However, in *Cornell University*, 183 NLRB 329 (1970), and *Yale University*, 189 NLRB 904 (1971), the Board unequivocally repudiated this course and held the worthiness of their purposes provided no exemption for colleges and universities. Subsequently, the same rule was applied to secondary schools;[14] private elementary, secondary, preschool, and special education institutions;[15] art galleries and schools of art;[16] nonprofit radio stations;[17] symphony orchestras;[18] and orphan asylums.[19]

Thereafter, in 1974, Congress endorsed and ratified the Board's action by removing from the Act the exemption for hospitals and providing specifically that health care institutions would be covered. In thus expunging from the Act the only provision which furnished a springboard for the Board's former exemptions of "worthy purpose" institutions or organizations, Congress has spoken plainly against providing special treatment for worthy purposes. Congress has thus closed the door to the exception which my colleagues now provided for the United Way because of the generosity of its activities.[20]

Worthiness of purpose is not a basis for special treatment under the Act. We have long since left that standard behind us, and Congress, in enacting the health care amendments to the Act, has endorsed our action. When an employer makes exceptions to his no-solicitation rules, the same exceptions must be extended to union solicitation. Worthiness of purpose cannot provide preference in solicitation over the statutory guarantee provided for union solicitation. Any deviation from this standard violates Section 8(a)(1).

It may also violate the Constitution. By grafting this exception for worthy purpose solicitation onto the Act, the majority breaches the production and discipline barrier which is the only justification for prohibiting union speech in the workplace. In doing so, they create discriminatory classifications which raise fundamental issues regarding free speech.[21] As stated recently by the Supreme Court in *Catholic Bishop*,[22] evidence of clear congressional intent is necessary before the Board may act in a manner which creates a significant risk that the first amendment will be infringed.

My colleagues Fanning and Zimmerman were right the first time in disposing of this issue here. I cannot join the majority in reentering a morass from which the Board extricated itself more than a decade ago. I dissent.

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[13] *Montgomery Ward & Company, Inc.*, 265 NLRB 60 (1982) (Chairman Van de Water and Members Fanning, Jenkins, and Zimmerman)

[14] *Shattuck School*, 189 NLRB 886 (1971).

[15] 39 F.R. 43410 (1974).

[16] *Trustees of the Corcoran Gallery of Art*, 186 NLRB 565 (1970); *Minneapolis Society of Fine Arts*, 194 NLRB 371 (1971).

[17] *Pacifica Foundation-KPFA*, 186 NLRB 825 (1970).

[18] Rules and Regulations, Sec. 103.2 (1973).

[19] *The Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*, 224 NLRB 1344 (1976).

[20] See cases cited in fn. 16, above.

[21] See *Taxation with Representation of Washington* v. *Regan*, No. 79-1464 (D.C. Cir., March 26, 1982).

[22] *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).